

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW HAMPSHIRE

In re:

Bk. No. 99-10511-MWV  
Chapter 13

Joyce R. Colby,  
Debtor

BA Mortgage, LLC,  
Movant

v.

CM No. 00-378

Joyce R. Colby,  
Respondent

MEMORANDUM OPINION

This matter comes before the Court on movant BA Mortgage, LLC's (the "Creditor") request for attorney's fees and costs associated with its motion for relief from the automatic stay. For the reasons set out below, the request for attorney's fees and costs is denied.

BACKGROUND

The Debtor's Chapter 13 Plan was confirmed on August 3, 1999, the terms of which provide for the cure of the prepetition arrearage on a "home-equity loan" secured by a first mortgage on the Debtor's residence and require regular postpetition payments outside of the plan. On May 18, 2000, the Creditor, holder of the first mortgage, filed a motion for relief from the automatic stay pursuant to § 362(d) of the Bankruptcy Code alleging that the Debtor failed to make postpetition mortgage payments for the months of April and May 2000. Following a hearing the Court denied the motion, but ordered the Debtor to pay late charges for her missed payments and set a hearing for further arguments on the issue of whether the Creditor could collect attorneys fees and costs associated with enforcing its rights in the event of default as provided for under the terms of the promissory note.

Prior to the hearing on the attorney's fees issue, the Debtor submitted a memorandum of law

contending that the Creditor is precluded from collecting attorney's fees and costs because the applicable provision in the promissory note violates NH RSA 361-C:2.<sup>1</sup> A hearing was held on August 15, 2000, and the Creditor filed an opposing memorandum of law in open court asserting that 11 U.S.C. § 506(b)<sup>2</sup> controls the granting of attorney's fees and costs to an oversecured creditor and preempts any contrary state statute. Following arguments, the Court took the matter under submission, allowing the Debtor to file a reply brief

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<sup>1</sup> The statute, which governs the collection of attorney's fees in consumer cases, provides:

If a retail installment contract or evidence of indebtedness provides for attorney's fees to be awarded to the retail seller, lender or creditor in any action, suit or proceeding against the retail buyer, borrower or debtor involving the sale, loan or extension of credit, such contract or evidence of indebtedness shall also provide that:

I. Reasonable attorney's fees shall be awarded to the buyer, borrower or debtor if he prevails in

(a) Any action suit or proceeding brought by the retail seller, lender or creditor; or

(b) An action brought by the buyer, borrower or debtor; and

II. If a buyer, borrower or debtor successfully asserts a partial defense or set-off, recoupment or counterclaim to an action brought by the retail seller, lender or creditor, the court may withhold from the retail seller, lender or creditor the entire amount or such portion of the attorney fees as the court considers equitable.

NH RSA 361:C-2. For purposes of the statute, "retail installment contract or evidence of indebtedness" is defined as:

[A]ny contract or evidence of indebtedness arising out of:

I. A retail installment sale in which the goods purchased are used primarily for personal, household or family purposes; or

II. A loan or extension of credit payable in installments, or for which a finance charge is or may be imposed, in which the proceeds of the loan or extension of credit are used primarily for personal, household or family purposes.

NH RSA 361-C:1.

<sup>2</sup> Section 506(b) of the Bankruptcy Code provides:

To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, *and any reasonable fees costs, or charges provided for under the agreement under which such claim arose.*

11 U.S.C. § 506(b)(emphasis added).

by August 21, 2000.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

### DISCUSSION

Section 506(b) allows an oversecured creditor to collect interest on its claim and attorney’s fees and costs if the agreement underlying the claim so provides. The issue before this Court is whether § 506(b) is applicable to attorney’s fees generated after confirmation of the Chapter 13 Plan. Upon consideration of the briefs and arguments of counsel, the Court finds that § 506(b) of the Bankruptcy Code is inapplicable to postconfirmation fees and costs.

The Supreme Court, in Rake v. Wade, 508 U.S. 464 (1993), discussed generally the application § 506(b) to confirmed Chapter 13 plans. In addressing the accrual of interest on an oversecured claim, the Court noted that “[i]t is generally recognized that the interest allowed by § 506(b) will accrue until payment of the secured claim *or until the effective date of the plan.*” Id. at 468 (emphasis added). Furthermore, the Court also observed that “the rights granted under Section 506(b) are relevant only until confirmation of the plan.” Id. The different treatment of postpetition and postconfirmation interest is also discussed by Collier’s, cautioning that “[a] distinction must be drawn in the chapter 11, 12 and 13 context between *postpetition* interest and *postconfirmation* interest. . . . Section 506(b) . . . has no application to a secured creditor’s entitlement to postconfirmation interest . . . .” 3 Collier on Bankruptcy ¶ 506.04[2](15th ed.).

The Debtor cites the case of In re Telfair, 224 B.R. 243, (Bankr. S.D.Ga. 1998), *aff’d. sub nom. Telfair v. First Union Mort. Corp.*, 216 F.3d 1333 (11<sup>th</sup> Cir. 2000), to support her position that § 506(b) is inapplicable to postconfirmation attorney’s fees in a Chapter 13 case. In that case, the debtor filed a complaint alleging that the creditor violated § 506(b) by not receiving court approval for assessing attorney’s

fees and costs associated with its postconfirmation motions for relief from the automatic stay. Relying on Rake v. Wade, the bankruptcy court held “[s]ection 506(b) is not a limitation on the allowance of attorney fees and expenses postconfirmation and pre-discharge nor does it authorize such fees postconfirmation. Simply put, § 506(b) has no application to claimed postconfirmation attorneys fees and expenses.” Id. at 246. The issue of postconfirmation attorney’s fees was also raised in In re Lichty, 251 B.R. 76 (Bankr. D.Neb. 2000), in which the bankruptcy court, also relying on Rake v. Wade, held that “[s]ection 506 does not govern the enforceability and allowance of interests, costs and expenses that arise after the Plan is confirmed.” Id. at 78. The bankruptcy court further held that the allowance of postconfirmation attorney’s fees was governed by state law. Id.

This Court agrees with Telfair and Lichty and holds that § 506(b) is inapplicable to postconfirmation attorney’s fees and costs. The Court also agrees with Lichty to the extent that it looked to state law to determine the right of a creditor to collect postconfirmation fees. Where Congress has chosen not to exercise its constitutional power to establish a rule pertaining to the collection of postconfirmation attorney’s fees, this Court is left to look to applicable state law. See Butner v. United States, 440 U.S. 48, 53 (1979). Thus, the remaining question before the Court is whether, under the laws of the State of New Hampshire, the Creditor can collect attorney’s fees and costs associated with its postconfirmation motion for relief from the automatic stay. The Court finds that it cannot.

Chapter 361-C of the New Hampshire Revised Statutes applies to attorney’s fees in consumer cases. The statute generally requires that if a “retail installment contract or evidence of indebtedness” provides for the award of attorney’s fees to a lender or creditor then the underlying agreement must also provide a reciprocal provision allowing the borrower or debtor to collect attorney’s fees if she is the successful party in an action by or against the lender or creditor. RSA 361-C:2. The applicable provision of the promissory note here provides: “If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example,

reasonable attorneys' fees." The provision clearly does not include the required reciprocal language. Thus, the remaining question is whether the statute is applicable in this context.

The Creditor argued at the hearing that RSA 361-C is wholly inapplicable to this type of loan. The Court disagrees. The statute applies to any "retail installment contract or evidence of indebtedness." RSA 361-C:2. The definition of "retail installment contract or evidence of indebtedness" includes "[a] loan or extension of credit . . . in which the proceeds of the loan or extension of credit are used primarily for personal, household or family purposes." RSA 361-C:1(II). The Debtor submitted several documents showing that the loan here falls within the statute's definition. First, the loan application itself, which sought a loan of \$42,750.00, contains a box directing the borrower to state the "Purpose of Refinance." In response, the Debtor listed "Divorce/Improve/Consol[idation]." In the next box, which asks the borrower to describe home improvements that will be financed by the loan, she listed "Electrical/Heating/Bathroom . . . \$20,075.00." The Debtor also submitted what appears to be an internal memorandum generated by the lender indicating that the loan proceeds would be used to "finish electrical work, upgrade heating, remodel bathroom and payoff mis[cellaneous] bills." Also included is a copy of an escrow agreement providing that funds to pay for the home improvements will be released upon inspection of the work by the lender. Finally, the Debtor provided a copy of the "Settlement Statement" showing that most of the remaining loan proceeds were paid directly to creditors. At no time did the Creditor challenge the Debtor's representations that the loan proceeds were used primarily for home improvements and household purposes. Thus, the Court finds that the loan here fits squarely within the scope of RSA 361-C:1, and therefore the statute is applicable. Because the language of the promissory note failed to provide the necessary reciprocal language, the Court finds that the creditor violated RSA 361-C.

Although the attorney's fees statute does not dictate a specific remedy, the Supreme Court of New Hampshire has indicated that a court has discretion in fashioning relief where RSA 361-C is applicable. Gaucher v. Cold Springs RV Corp., 700 A.2d 299, 302, 142 N.H. 299, 303 (N.H. 1997)(contract that satisfies requirements of RSA 361-C confers discretion on the court to determine whether to award fees).

The Court finds that the logical and appropriate remedy in this instance is to find the attorney's fees provision in the promissory note unenforceable due to its failure to satisfy the requirements of the statute.

#### CONCLUSION

For the above reasons, the Court finds that § 506(b) is inapplicable to postconfirmation attorney's fees and costs and that the promissory note violates RSA 361-C. This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. Accordingly, the creditor's request for attorney's fees and costs is denied. A separate order consistent with this opinion will be issued.

Dated this \_\_\_\_ day of September, 2000, at Manchester, New Hampshire.

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Mark W. Vaughn  
Chief Judge